

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute and regulations involved.....	2
Statement.....	2
Argument.....	5
Conclusion.....	9
Appendix.....	10

CITATIONS

Cases:

<i>Durden v. Commissioner</i> , 3 T. C. 1.....	7
<i>Houdry v. Commissioner</i> , 7 T. C. 666.....	6
<i>Lyman v. Commissioner</i> , 83 F. 2d 811.....	5, 8
<i>Olds & Whipple v. Commissioner</i> , 75 F. 2d 272.....	8
<i>Shearer v. Anderson</i> , 16 F. 2d 995.....	7
<i>United States v. White Dental Co.</i> , 274 U. S. 398.....	6

Statutes:

Internal Revenue Code:

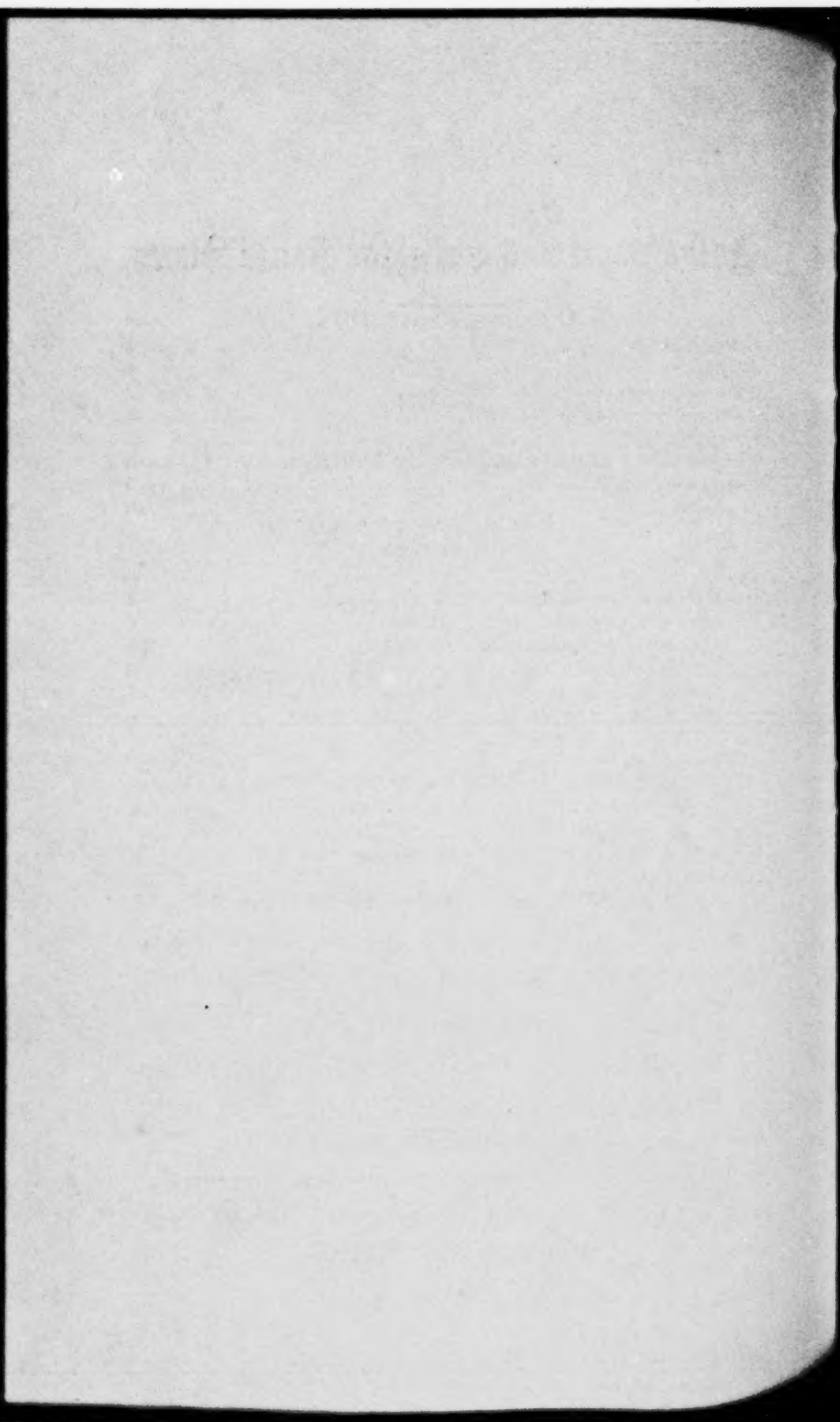
Sec. 23 (26 U. S. C. 23).....	7
Sec. 127 (26 U. S. C. 127).....	6, 8
Sec. 812 (26 U. S. C. 812).....	7, 10

Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 156.....	9
--	---

Miscellaneous:

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 104-106 (1942-2	
Cum. Bull. 504, 599-601).....	8
Treasury Regulations 105, Sec. 81.39.....	11

(1)



In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 133

**GEORGE J. LEEDS, HERMAN J. DONNER AND HARRY
LEVINE, EXECUTORS OF THE ESTATE OF ADOLF W.
E. B. LEEWITZ, DECEASED, PETITIONERS**

v.

THE UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 17-22) and the opinion of Judge Littleton, dissenting in part (R. 23), are reported in 75 F. Supp. 312.

JURISDICTION

The judgment of the court below was entered on April 5, 1948 (R. 23-24). The petition for a writ of certiorari was filed on June 30, 1948. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Where an estate owned stock in corporations in France and Belgium and, during the administration of the estate, in 1942, the German Government issued orders of sequestration against the corporations, is the estate entitled to a deduction under Section 812 (b) of the Internal Revenue Code for losses arising from "other casualties"?

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the pertinent statute and regulations are set forth in the Appendix, *infra*, pp. 10-11.

STATEMENT

The special findings of fact of the Court of Claims (R. 12-17), insofar as material to the issue raised in the petition, may be summarized as follows:

Petitioners are the executors of the estate of Adolf W. E. B. Leewitz, who died on March 18, 1939. The executors duly filed an estate tax return, including as part of the gross estate shares of stock of four foreign corporations: Markt & Co., an English corporation, with its principal place of business at Brussels, Belgium; Markt & Co. (Paris) Ltd., a British corporation, with its principal place of business at Paris, France; Produits Jex Societe Anonyme, a French corporation, with its principal place of business at Paris, France; and Nedal Societe Anonyme, a French

corporation, with its principal place of business at Paris, France, at a total valuation of \$82,809.49. This value placed on the stock was accepted by the Commissioner of Internal Revenue as correct. (R. 12-13.)

The estate of the decedent at all times mentioned was and still is in process of settlement and administration, and the estate continued to own the stock of the four corporations mentioned above at least until 1946. In the years 1940 and 1941, the armies of Germany overran France and Belgium and occupied those countries. On December 11, 1941, the United States declared war on Germany. During the year 1944, Paris, France, and Brussels, Belgium, were liberated. (R. 15.)

On February 17, 1942, a German sequestrator was appointed for the corporation Markt & Co. (Paris) Ltd., and on November 19, 1942, a German sequestrator was appointed for the Markt corporation at Brussels. In each case the sequestrator took under his control all the business of the company. The orders of sequestration in each case provided that, during the time of the administration, the powers and authority of the manager and of any other persons entrusted with the representation or management of the enterprise were suspended, and that the sequestrator was authorized to represent the enterprise. The German authorities did not remove any of the property of these corporations; and

Theodore Boury, who was the manager of Markt & Co. (Paris) Ltd., at the time of the issuance of the sequestration order, continued to act under the control and direction of the German sequestrator. These corporations continued in business although, during the period of the German occupation, their businesses declined drastically due to their inability to import goods from the United States, which was the most important part of their prewar activities. (R. 15-16.)

The sole business of Nedal Societe Anonyme was the manufacture of steel wool and it was the largest manufacturer of its kind in France. In August 1942, the Germans, by order of their military authorities, took all the machinery from the Nedal factory and that machinery has not yet been returned. Produits Jex Societe Anonyme was the sole selling agent of Nedal Societe Anonyme and that constituted its most important activity. This latter activity was entirely cut off on the removal of the machinery from the Nedal plant and the principal business of Produits Jex Societe Anonyme was destroyed. In June and July 1942, respectively, a German sequestrator was named for the Nedal Societe Anonyme and the Produits Jex Societe Anonyme. These orders of sequestration were similar to that in the case of the Markt & Co. at Paris. (R. 16.)

Petitioners duly filed a claim for refund of estate tax upon the ground that the amount of \$82,809.49, the value of the stocks as of decedent's

death, should be allowed as a deduction from the gross estate under the provisions of Section 812 (b) (5) of the Internal Revenue Code (R. 6-9, 17). The Commissioner of Internal Revenue disallowed this claim and this suit was brought in the Court of Claims within two years of the rejection thereof (R. 17, 1).

The Court of Claims held that petitioners were not entitled to deduct the value of the stocks from the gross estate under the provisions of Section 812 (b) (5), Internal Revenue Code. The court, however, rendered judgment for petitioners in the amount of \$11,136.88 resulting from the allowance of certain executors' commissions and attorney's fees, but this issue is not involved in the petition. (R. 17, 23-24.)

ARGUMENT

1. The basic difficulty with the petitioners' case is their failure to prove "the losses alleged to have been sustained." (R. 20.) Since the judgment of the court below rests upon that failure of proof (*id.*), its ruling raises no question requiring review by this Court. Were it not for this deficiency in the record, the questions that might have arisen out of a case properly made might have been of intrinsic importance. As a practical matter, however, there seems only to have been one other reported case involving a construction of that portion of the estate tax allowing a loss deduction (*Lyman v. Commissioner*, 83 F. 2d 811 (C. C. A. 1st)), and petitioners refer to no

pending cases. Petitioners do refer to other cases involving a similar provision in the income tax laws, but, for years beginning after December 31, 1940, Section 127 of the Internal Revenue Code makes special provision for war losses and their effect on income tax (see Appendix to Pet. for Cert., pp. 17-19), and thus minimizes the importance of the construction of the general loss provisions to this field.

2. All of the decisions alleged by the petitioners to be in conflict with that of the court below are income tax cases, and hence, are of only collateral interest. Moreover, they involve factual variants which are of substantial distinguishing importance. In *Houdry v. Commissioner*, 7 T. C. 666, and *United States v. White Dental Co.*, 274 U. S. 398, the Vichy and German authorities had taken action with respect to property which the courts, respectively, characterized as "confiscation" (7 T. C. at 667) and a taking "similar in purpose and legal effect to that authorized under the Trading with the Enemy Act of the United States" (274 U. S. at 399). In the case at bar, the effect of the sequestrations is not shown. The German orders of sequestration themselves speak in terms of suspending private management, not terminating it (R. 15. It is true that in the case of *Nedal Societe Anonyme*, there was evidence that machinery was moved out and the factory later destroyed but, again as the court below noted,

there is no showing as to what other assets the corporation may or may not have had. "The same holds true as to the stock held by the estate of *Produits Vex Societe Anonyme*, whose principal business was as selling agent for the Nedal concern." (R. 21.) Thus the record is barren with respect to the question of whether petitioners' stock had become worthless.

Shearer v. Anderson, 16 F. 2d 995 (C. C. A. 2d), simply holds that to fall within the loss provision of the income tax laws, the "casualty" need not be attributable to purely natural causes. Nothing in the decision below is to the contrary.

3. Even if the petitioners are correct in their contention that Sections 812 (b) (5) (estate tax provision) and Section 23 (e) (3) (income tax provision) are in *pari materia* and should be read together, their position in this case is no stronger. Petitioners cite no cases holding that the mere existence of a state of war gives rise to a casualty loss deduction. Cf. *Durden v. Commissioner*, 3 T. C. 1, and cases cited therein as to when losses are deductible for income tax purposes under the "other casualty" provisions. Mere shrinkage in value of stocks has been held not sufficient to result in a deductible loss under the casualty sections of the Code whether for income tax or estate tax purposes, or in fact under any of the other loss provisions of the income tax statutes. *Olds & Whipple v. Commissioner*, 75

F. 2d 272 (C. C. A. 2d) (income taxes); *Lyman v. Commissioner*, 83 F. 2d 811 (C. C. A. 1st) (estate taxes).

4. The action of the court below in refusing to consider the provisions of Section 127 of the Internal Revenue Code, as added by the 1942 Act (Appendix to Pet. for Cert., pp. 17-19), since in its opinion it had no application to estate taxes, was proper. Section 127 allows a deduction for "war losses" providing that in certain circumstances arising out of World War II, losses are "deemed" to have been sustained at certain dates. It gives the taxpayer a certain choice of dates as to when the loss may be claimed without the necessity of proving actual seizure or destruction and makes elaborate provision for the inclusion in income of later years of any recoveries.¹ The conclusion of the court below is supported by the language of the statute itself which clearly refers to the determination of tax on an annual basis. Section 127 states that the losses are allowable "For the purposes of this chapter" (Chapter 1 of the Code which deals with the imposition of income taxes).² Section 156 (b) of the Revenue

¹ The report of the Senate Finance Committee on the 1942 Act, S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 127-130 (1942-2 Cum. Bull. 504, 599-601); states that this section provides practical rules for the treatment of property destroyed or seized in the course of military or naval operations in view of the difficulty in determining when the actual destruction or seizure occurred, or in determining the facts establishing the loss in case the property is in enemy country.

Act of 1942, c. 619, 56 Stat. 798, provides that "The amendments made by this section shall be applicable to taxable years beginning after December 31, 1940."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

✓ PHILIP B. PERLMAN,
Solicitor General.

✓ THERON LAMAR CAUDLE,
Assistant Attorney General.

✓ STANLEY M. SILVERBERG,
✓ ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

AUGUST 1948.

² Estate taxes are imposed by Chapter 3 of the Code.

APPENDIX

INTERNAL REVENUE CODE

SEC. 812. NET ESTATE.

For the purpose of the tax, the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

- (1) for funeral expenses,
- (2) for administration expenses,
- (3) for claims against the estate,

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and

(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent,

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness, shall, when founded upon a promise or agree-

ment, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. There shall also be deducted losses incurred during the settlement of estates arising from fires, storms, shipwrecks, or other casualties, or from theft, when such losses are not compensated for by insurance or otherwise, and if at the time of the filing of the return such losses have not been claimed as a deduction for income tax purposes in an income tax return.

* * * * *

(26 U. S. C. 812.)

TREASURY REGULATIONS 105, PROMULGATED UNDER
THE INTERNAL REVENUE CODE

SEC. 81.39. *Losses from casualties or theft.*—There may be deducted under this heading losses incurred during the settlement of the estate arising from fires, storms, shipwrecks, or other casualties, or from theft, if such losses are not compensated for by insurance or otherwise. Such losses are not deductible if, at the time of the filing of the estate-tax return, they have been claimed as a deduction for income-tax purposes in an income-tax return. If the loss is partly compensated for, the excess of the loss over such compensation may be deducted. Losses not of the nature described are not deductible. In order to be deductible a loss must occur during the settlement of the estate. If a loss with respect to an asset occurs after distribution thereof to the distributee it may not be deducted.